

remain high, exceeding the costs incurred by VHF stations, and placing an additional economic burden on the owners of UHF stations.

The Comments submitted by the National Association for Broadcasters ("NAB") in this proceeding provide persuasive evidence that a "UHF penalty" continues to exist. As outlined in Stephen E. Everett's report, "The 'UHF Penalty' Demonstrated," VHF network affiliates on average receive higher ratings than UHF network affiliates.<sup>19/</sup> For instance, VHF affiliates in all of A.C. Nielsen's DMAs averaged a 9.6 prime-time rating while UHF affiliates in the same markets averaged only a 6.4 rating.<sup>20/</sup> ABC's VHF affiliates averaged a 9.4 prime-time rating in 1997 whereas their UHF counterparts only averaged a 6.8 rating.<sup>21/</sup> Similarly, NBC's VHF affiliates averaged a 9.5 rating whereas NBC's UHF affiliates averaged only a 7.4 rating.<sup>22/</sup> The differences also are consistent across all markets. In the 25 largest DMAs, VHF affiliates earned an average 9.9 rating whereas UHF affiliates averaged only a 6.2 rating.<sup>23/</sup> In DMAs ranked 51-100, VHF affiliates garnered an average rating of 9.5 whereas UHF affiliates garnered an average rating of 6.2.<sup>24/</sup>

Financially, VHF stations also outperform UHF stations. As reported in the

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<sup>19/</sup> Stephen E. Everett, Ph.D., "The 'UHF Penalty' Demonstrated," *submitted with the Comments of the National Association for Broadcasters*, MM Docket No. 98-35, July 21, 1998, at 1 ("Everett Study").

<sup>20/</sup> *Id.* This information is based on data compiled by A.C. Nielsen in November 1997. *Id.*

<sup>21/</sup> *Id.* at 2.

<sup>22/</sup> *Id.*

<sup>23/</sup> *Id.* at 3.

<sup>24/</sup> *Id.*

Comments of NAB,

[g]iven their inherent coverage disadvantages, UHF stations tend to attract smaller audiences than for their VHF counterparts, for the same programming. With these smaller audiences, it easily follows that advertising revenues, pre-tax profits and cash flows should be lower than comparative VHF stations.<sup>25/</sup>

The Fratrik Study submitted by NAB demonstrates that from 1993 through 1996, UHF network affiliates<sup>26/</sup> generated 41.8% to 44.1% of the net revenues, 34.3% to 37.1% of the cash flow, and 19.6% to 24.1% of the pre-tax profits that were generated by VHF affiliates.<sup>27/</sup> (THIS IS A 75% DISPARITY.) The disparity between UHF and VHF economic performance also is demonstrated by an analysis of net revenues, pre-tax profits and cash flow by affiliate type. For instance, in 1996, ABC's UHF affiliates generated only 32.4% of the net revenues, 4.5% of the pre-tax profits, and 24.6% of the cash flow that was generated by ABC's VHF affiliates.<sup>28/</sup> (AGAIN, THIS IS A 75% DISPARITY.) UHF stations affiliated with the Fox network in 1996 earned only 39.5% of the net revenues, 25.5% of the pre-tax profits, and 41.0% of the cash flow generated by VHF stations affiliated with the same network.<sup>29/</sup> (THIS IS A 60% DISPARITY.) Thus, even within the larger networks, there is a greater than 50% disparity between UHF and VHF stations.

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<sup>25/</sup> Mark R. Fratrik, Ph.D., "A Financial Analysis of the UHF Handicap," submitted with the Comments of NAB, MM Docket No. 98-35, July 21, 1998, at 1 (citations omitted) ("Fratrik Study").

<sup>26/</sup> ABC, CBS, Fox and NBC affiliates.

<sup>27/</sup> *Id.* at 2, Figure 1.

<sup>28/</sup> *Id.* at 5, Figure 3.

<sup>29/</sup> *Id.*

Relevant to the disparities in financial performance, of course, is the dramatic difference in the cost of operating a VHF station as opposed to a UHF station. Included in Exhibit A hereto is a chart outlining the costs of electricity for UHF and VHF stations based on channel, maximum effective radiated power ("ERP"), and transmitter power output, and the costs of transmission equipment. Again, the figures tell the story. Because a UHF station, by its very nature, must operate at higher power than a VHF station, and because the higher power requires more electricity and a more powerful transmitter, the costs of operating a UHF station are significantly higher. Electricity costs alone for a UHF station are almost three times the cost of powering a low VHF station and one and one-half times the cost of powering a high VHF station. Equipment costs are similarly high. A transmitter for a UHF station is likely to cost approximately \$1,250,000. A low channel VHF station need only expend \$400,000 for a transmitter.

In sum, the economic disparities between UHF and VHF stations continue and the evidence demonstrates that the economic disadvantages suffered by UHF stations are a direct result of the UHF band's technical shortcomings.<sup>30/</sup> Because the playing field between UHF

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<sup>30/</sup> Not surprisingly, given these statistics, the industry continues to view a UHF station as providing an inferior signal. One has only to review Fox's successful attempt in 1994 to affiliate with an increased number of VHF stations, resulting in a termination of affiliation agreements with UHF stations, to discern the industry's position. See Julie A. Zier, *Fog of war engulfs affiliation battles; affiliation of television stations with networks*, BROADCASTING & CABLE, Dec. 5, 1994, at 50 (describing the Fox network's "upgrades" to VHF stations in 16 markets and the three major networks' "downgrades" to UHF stations in 19 markets); Geoffrey Foisie, *Figuring the pluses, minuses of Fox-New World; Fox Television's affiliation agreement with New World Communications Group Inc.*, BROADCASTING & CABLE, May 30, 1994, at 10 (noting that Fox's affiliation with VHF stations will force one of the other three networks to "suffer from the inferior coverage of a UHF affiliate").

and VHF stations remains substantially unbalanced, the Commission must retain the UHF discount.

**3.     *The Implementation of Digital Television Will Not Eliminate the Disparity Between UHF and VHF Stations.***

The Commission's suggestion in the *Notice of Inquiry* that the full transition to digital television ("DTV") will eliminate the need for the UHF discount<sup>31/</sup> is inaccurate and premature at best and cannot support any change in the rule. It is impossible to predict at this time whether the conversion to digital television will alleviate the historic UHF/VHF disparity; indeed, in comparing the power levels assigned to VHF stations operating on UHF digital channels with those assigned to UHF stations operating on UHF digital channels, it is clear that the UHF/VHF technical disparity will exist notwithstanding the conversion to DTV.

Set forth below is a chart illustrating the DTV power levels assigned to certain of Paxson's UHF stations and those assigned to VHF stations that will operate on digital UHF channels in the same markets. The disparities in power level confirm that a substantial number of UHF stations, even in the DTV world, will suffer from technical signal

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<sup>31/</sup>     *Notice of Inquiry* ¶ 27.

deficiencies far in excess of 50%.

Market	PAXSON DTV Channel	PAXSON Power	V-U Channel	V-U Power	Disparity
New York, NY	30	104	28	164	37%
Los Angeles	38	210	36	711	70.5%
Philadelphia	31	50	26	1000	95%
Washington, DC	43	69	39	1000	93%
Dallas, TX	42	106	35	1000	89%
Seattle, WA	32	50	38	1000	95%

Adding to the uncertainty is the outstanding question of what if any mandatory cable carriage rights DTV stations will have. Until the industry and the Commission have more experience with this new technology, and specifically UHF station coverage vis-a-vis VHF station coverage as well as mandatory carriage rights, the Commission would be ill-advised to base any change in its ownership rules on the possibilities of DTV technology.

*a. The FCC's DTV Rules Do Not Place UHF Stations on an Even Par with VHF Stations.*

The implementation of DTV will not result in the "equalization" of UHF and VHF coverage areas. First, until the DTV transition is completed, it will be impossible for the FCC to determine whether UHF and VHF analog stations operating on a digital channel will have the same coverage. Although it is true that the majority of stations, whether currently operating on UHF or VHF channels, will operate in the UHF band, until stations are

operating with their authorized DTV facilities and this new technology is fully implemented, neither the FCC nor the industry is in a position to evaluate UHF and VHF station coverage.

Second, as evidenced by the power levels listed in the chart above, the FCC's DTV rules are not designed to eliminate the technical disparity between UHF and VHF television stations. Instead, the FCC's DTV allotment scheme is based primarily on replication of existing analog service.<sup>32/</sup>

We continue to believe that our service replication proposal, with some modifications, is the appropriate approach for implementation of DTV. We believe that providing DTV allotments that replicate the service areas of existing stations offers important benefits for both viewers and broadcasters. This approach will ensure that broadcasters have the ability to reach the audiences that they now serve and that viewers have access to the stations that they can now receive over-the-air.<sup>33/</sup>

The Commission has recognized that replication of existing UHF station service areas will not equalize VHF and UHF coverage areas. On reconsideration of the *Sixth Report and Order*, the Commission acknowledged "the difficulties that UHF stations may face under the current service replication plan . . . in competing with the higher-powered DTV service of existing VHF stations."<sup>34/</sup> The Commission concluded that additional measures were necessary to reduce the disparities "inherent in the current service replication process."<sup>35/</sup>

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<sup>32/</sup> *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Sixth Report and Order*, MM Docket No. 87-268, 12 FCC Rcd 14588, 14605, ¶ 29 (1997) ("*Sixth Report and Order*"), on reconsideration, *Memorandum Opinion and Order on Reconsideration of The Sixth Report and Order*, MM Docket No. 87-268, 13 FCC Rcd 7418 (1998) ("*Sixth DTV Reconsideration*"), appeal pending.

<sup>33/</sup> *Sixth Report and Order*, 12 FCC Rcd at 14605, ¶ 29 (emphasis added).

<sup>34/</sup> *Sixth DTV Reconsideration*, 13 FCC Rcd at 7450, ¶ 79.

<sup>35/</sup> *Id.*

Accordingly, the Commission modified its DTV rules to permit UHF stations to maximize their DTV coverage and service through power increases and use of beam tilting techniques.<sup>36/</sup> There is no guarantee, however, while DTV is still in the early stages, that all UHF stations will be able to take advantage of these opportunities or that in increasing power or using beam tilting techniques, the result will be a maximization of UHF service that is equivalent to VHF station coverage. In short, until UHF DTV stations' coverage can be fully assessed based on real-world experience, there is no basis for the Commission to conclude that the UHF discount would not be necessary to ensure UHF/VHF parity.

*b. Mandatory Cable Carriage Is a Virtual Unknown in the DTV Era.*

As noted above, mandatory cable carriage of broadcast stations has been critical to the improved economic status of UHF stations in recent years. Cable carriage of DTV signals, however, has yet to be resolved and it is not at all clear what the resolution will be. This ongoing uncertainty is an additional factor that weighs against making any changes to the UHF discount.

To say that digital must-carry is controversial is a gross understatement. The Commission's much-anticipated *Notice of Proposed Rule Making* on digital must-carry was only recently released on July 10, 1998.<sup>37/</sup> The issues raised in the *Must-Carry Notice* are both numerous and complex and include carriage of analog and digital signals during the DTV transition period, compatibility and carriage of multiple digital formats, picture quality

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<sup>36/</sup> *Id.* ¶¶ 79-85.

<sup>37/</sup> *Carriage of the Transmissions of Digital Television Broadcast Stations Amendments to Part 76 of the Commission's Rules, Notice of Proposed Rule Making*, CS Docket No. 98-120, FCC 98-153 (rel. July 10, 1998) (the "*Must-Carry Notice*").

standards, and carriage of broadcasters' ancillary services included in the digital broadcast signal. The broadcast and cable industries are sharply divided over these issues,<sup>38/</sup> and indeed the Commission's *Must-Carry Notice* poses far more questions than solutions.

What is clear is that "must-carry" of DTV signals will take some time to resolve. The Commission cannot simply assume that mandatory cable carriage of UHF stations' DTV signals will alleviate UHF signal disparities vis-a-vis VHF stations. The must-carry factor in the transition to DTV accordingly provides no basis for any changes in the UHF discount.

**C. *The UHF Discount is Critical to the Development of New Broadcast Networks.***

As demonstrated by Paxson's own experience, the UHF discount is essential to the creation and successful development of new broadcast networks. On August 31, 1998, Paxson will launch a new broadcast network, PAXTV, the nation's seventh largest broadcast network. The long-term success of PAXTV will depend to a significant extent on its ability to distribute economically high quality programming to as many viewers as possible. No network can afford to pay affiliate fees and live off the income from network spot revenues only. Financial stability leading to increased network expenditures for original program fare can only come through owning as many distribution outlets as possible and enjoying the revenues from network spot, national spot and local ad sales. Absent the UHF discount, however, Paxson would be prohibited from owning all of its stations under the national ownership rule. And, absent ownership of its primary distribution system, Paxson would not attempt the launch of a new network.

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<sup>38/</sup> See Chris McConnell and Price Colman, *FCC tackles digital must-carry*, BROADCASTING & CABLE, July 13, 1998, at 8-9.

**1. PAXTV.**

PAXTV will be the nation's seventh largest broadcast network, providing a unique selection of programming unduplicated by the other networks. The majority of PAXTV programming will consist of one-hour drama, situation comedy, talk and information programs and movies, and will be family-oriented, focussing on family values and issues of broad interest. The PAXTV programming will have no senseless violence, no foul language and no explicit sex. Although many of these programs have aired or will air on other broadcast networks, PAXTV will be the first broadcast network to package the programs together with a family focus. Among the leading programs that will be featured on PAXTV are *Touched By An Angel*, *Promised Land*, *Dr. Quinn*, *Medicine Woman*, *Diagnosis Murder*, *Highway to Heaven*, and *Life Goes On*. Additional programs to be aired on the network include *I'll Fly Away*, *Dave's World*, *Christy*, *The Father Dowling Mystery Series*, *Love Boat*, and *Seventh Heaven*. PAXTV will have 15 hours of original fare a week, more than any other new network, and the shows will include *Little Men*, *The New Flipper*, *Neon Rider*, *It's A Miracle*, *Great Day*, *Women's Day* and two hours a week of children's educational programming.

**2. Paxson's UHF Television Stations Are Critical to the Successful Launch of PAXTV.**

Paxson and the new PAXTV network are the new economic paradigm for the future world of fractionalized television audiences. Paxson's strategy for the launch and growth of PAXTV establishes the new broadcast network organization. The traditional networks --

ABC, CBS and NBC -- own only a small fraction of their affiliates.<sup>39/</sup> The majority of their affiliates are separately-owned, operate independently of the network, and receive compensation from the network. The increasing level of competition for affiliates in the television industry, however, makes it clear that any new network must have a more established and controlled distribution system from its very inception. In order to compete successfully with ABC, CBS and NBC, as well as the newer networks, Fox, UPN and WB, and numerous cable television program services, a new broadcast network must be able to rely on a significant number of owned stations to reach viewers, to attract advertisers and to enjoy all levels of ad revenue (national, network and local).

As evidenced by the numerous affiliation switches that have taken place over the past few years, the competition among ABC, CBS, NBC and Fox for broadcast network affiliates, particularly those operating on VHF channels, is fierce.<sup>40/</sup> The stakes increased with the launch of the UPN and WB networks in 1995 as they vied (and continue to vie) with each other and the four larger networks for affiliates.<sup>41/</sup> In the face of this level of competition, Paxson has found that its chances of successfully launching a new network are substantially increased if it owns the majority of its network distribution. Paxson currently owns 49 television stations nationwide, and after the completion of pending acquisitions and

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<sup>39/</sup> *Broadcasting & Cable Yearbook 1998, supra note 2.*

<sup>40/</sup> *See supra note 27.*

<sup>41/</sup> *See David Tobenkin, New players get ready to roll; UPN, WB Network prepare to take their shots, BROADCASTING & CABLE, Jan. 2, 1995, at 30; Cynthia Littleton, WB, UPN rally the troops, BROADCASTING & CABLE, June 10, 1996, at 20 (describing "fierce" competition between WB and UPN for affiliates); Lynette Rice, Round three: UPN vs. The WB; competition to become the winning fifth network, BROADCASTING & CABLE, Aug. 26, 1996, at 5.*

transactions, will own a total of 69 stations nationwide. The majority of these stations are newly-constructed UHF stations or under performing UHF stations acquired by Paxson over the last four years. Over the past two years alone, Paxson has constructed 17 full power UHF stations, and has substantially rebuilt the technical facilities of approximately 20 more full power UHF stations. Paxson has infused these stations with capital, improved technical facilities and now with improved programming and will use these stations as its primary distribution system for the launch of PAXTV.<sup>42/</sup> Absent the UHF discount, however, Paxson would be prohibited from owning this number of stations and would not have as great an incentive to launch its new network.<sup>43/</sup>

Paxson's acquisition and use of UHF stations to "grow" its network are consistent with the role UHF stations have played in the development of new broadcast networks historically. Although the majority of the ABC, CBS and NBC network affiliates are VHF stations, the majority of the other three networks' affiliates are UHF stations. For instance, NBC has 153 VHF affiliates and only 61 UHF affiliates.<sup>44/</sup> CBS has 174 VHF affiliates and only 36 UHF affiliates.<sup>45/</sup> Fox, UPN and WB, however, have relied to a far greater extent on UHF stations to distribute new network programming. For example, UPN has 27 VHF

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<sup>42/</sup> PAXTV will also be entering into affiliation agreements with non-Paxson owned stations and cable systems.

<sup>43/</sup> The stations' aggregate audience reach exceeds 50% of U.S. television households not taking into account the UHF discount. Applying the UHF discount, Paxson's stations' are attributed with only 33.77% of U.S. television households.

<sup>44/</sup> NBC, <<http://www.nbc.com/stations>>

<sup>45/</sup> CBS, <<http://www.cbs.com/navbar/affiliates.html>>

affiliates and 129 UHF affiliates.<sup>46/</sup> Similarly, Fox has 132 UHF affiliates and 41 VHF affiliates.<sup>47/</sup> The PAXTV distribution system operates in the UHF band and all of its affiliates (which total 15) are UHF except for two.

**3. *Retaining the UHF Discount Ultimately Serves the Commission's Diversity and Competition Goals.***

By retaining the UHF discount, the Commission also will encourage the development of new broadcast networks like PAXTV, ultimately resulting in increased diversity and competition. It is undisputed that the development of the Fox, UPN and WB networks has contributed to competition among the networks and the diversity of network programming. Each of these new networks has proven to be an effective competitor to the three traditional networks -- ABC, CBS and NBC. For example, Fox has increased the level of competition among the networks for the rights to air professional sports programming. Both UPN and WB have increased the hours, types and quality of programming available to viewers today.<sup>48/</sup>

PAXTV will be an effective seventh competitor to the six existing broadcast networks. Its programming, when launched, airs seven days a week and is designed to appeal to a broad viewership but has a relatively narrow focus on family and values-oriented programming. Its programming is particularly responsive to governmental and societal

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<sup>46/</sup> UPN, <<http://www.upn.com/aboutsite/affiliates.html>>

<sup>47/</sup> Twentieth Century Fox, <<http://www.foxworld.com/usaff.html#al>>

<sup>48/</sup> See Michael Stroud, *Valentine vows improvement; United Paramount Network*, BROADCASTING & CABLE, June 15, 1998, at 45 (discussing UPN's efforts to target various demographic groups); Michael Stroud, *WB tops UPN season to date, Warner Brothers*, BROADCASTING & CABLE, Feb. 23, 1998, at 41 (discussing WB's programming designed to reach teenage audiences).

concerns that today's television programming is characterized more by sex and violence than family values. In developing this family-oriented package of programming, PAXTV will provide a unique alternative for both advertisers and viewers. And, through ownership of its primary distribution system, its UHF stations, Paxson can ensure that this unique alternative not only has present staying power among advertisers and viewers but also has the distribution base necessary to grow and develop into a full-fledged network. The total economics of the ownership of the network's distribution (national, network and local) will be the basic factor allowing PAXTV to offer competitive programming.

Retaining the UHF discount also will provide added incentive for future broadcast networks. Like Paxson, an entity contemplating the launch of a network must have a strong incentive to network its programming. It can only do so if it is permitted to own a significant amount of its television distribution. The UHF discount in part will keep open the door for future broadcast networks to develop a network organization in a similar manner, thus further enhancing the level of diversity and competition among program networks.

***D. Existing Ownership Interests Should Be Grandfathered in the Event the Commission Limits or Eliminates the UHF Discount.***

As demonstrated above, there is no basis for the Commission to eliminate or narrow the scope of the UHF discount. However, should the FCC decide to take such action, Paxson urges the Commission to grandfather all ownership interests existing at the time of its decision which would not comply with the national ownership rule absent the UHF discount. Grandfathering of existing ownership interests not only would be the fairest solution but also would be consistent with established precedent.

Paxson currently owns 49 television stations nationwide; after the completion of pending transactions, it will own 69 stations nationwide representing 66.3% of the television households in the country. Absent the UHF discount, Paxson's ownership interests would exceed the national cap. To require Paxson (and similarly-situated group owners) to divest their interests if the UHF discount is eliminated would be manifestly unfair and not in the public interest and the seventh network would cease to exist. Neither Paxson nor other group owners should be penalized for their full compliance with the FCC's ownership rules at the time those rules were in effect. Although the FCC has in various proceedings discussed whether to retain or modify the UHF discount, it has not suggested, as it has with other pending ownership rule changes<sup>49/</sup> that it would require divestitures upon a change in the rule nor has it conditioned the grant of sale applications on the outcome of pending proceedings. Moreover, requiring Paxson to divest a portion of its stations, part and parcel of the PAXTV network, could seriously hamper PAXTV's ability to compete in the network business and to expand its original program offerings.

In the face of changes to its ownership rules, the Commission has in the past grandfathered ownership interests that would not comply with the new rule. In those cases, the Commission concluded that forced divestiture would have consequences adverse to the public interest and therefore should be undertaken only in the most serious of circumstances.

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<sup>49/</sup> See, e.g., *Review of the Commission's Regulations Governing Television Broadcasting, Second Further Notice of Proposed Rule Making*, MM Docket Nos. 91-221, 87-7, 11 FCC Rcd 21655, 21672, ¶ 38 (1996) (adopting interim duopoly waiver policy conditioned on outcome of Rule Making proceeding) ("*Second Further Notice*"); *Shareholders of Citicasters, Inc.*, 11 FCC Rcd 19135 (1996) (announcing policy that certain waivers of one-to-a-market rule would be conditioned on outcome of television ownership proceeding).

For instance, when the Commission adopted the newspaper/broadcast cross-ownership prohibition in 1975, it required ownership divestitures only in the most "egregious" of cases, recognizing that "stability and continuity of ownership do serve important public purposes."<sup>50/</sup> In that proceeding, the Commission only required divestiture where the commonly-owned newspaper and broadcast interests had a monopoly in a community such that no other radio or television voice could be expected to serve the local community's needs and interests.<sup>51/</sup> The Commission reached a similar conclusion in not requiring divestiture of existing radio/television combinations which pre-existed the adoption of the radio/television cross-ownership rule.<sup>52/</sup>

The same rationale supports grandfathering of existing ownership interests in the event the Commission eliminates or restricts the UHF discount. The Commission must weigh the diversity and competitive benefits of divestiture against the adverse impact on local stations and network programming. Paxson submits that divestiture of its stations would have no benefit for the public in terms of increased diversity or competition. Of the 1,211 licensed commercial television stations in the United States,<sup>53/</sup> Paxson would own only 69,

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<sup>50/</sup> *Amendment of Sections 73.34, 73.240, and 76.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order*, Docket No. 18110, 50 FCC 2d 1046, 1078, 1080 ("1975 Second R & O"), recons. granted, *Memorandum Opinion and Order*, Docket No. 18110, 53 FCC 2d 589 (1975), modified, *National Citizens Committee for Broadcasting v. FCC*, 555 F.2d 938 (D.C. Cir. 1977).

<sup>51/</sup> 1975 Second R & O, 50 FCC 2d at 1081-82.

<sup>52/</sup> *Id.* at 1054.

<sup>53/</sup> *Broadcast Station Totals As of May 31, 1998, News Release* (rel. June 19, 1998).

only slightly more than 5% of the total number of commercial television stations.

Notwithstanding this relatively small percentage, Paxson's stations will represent a new programming voice, offering viewers and advertisers a viable and wholesome alternative to other network programming, and contributing to diversity and economic competition in local markets. Forced divestiture would only result in disruption of local programming and service and most likely a discontinuation of PAXTV network programming in local markets. Divestiture also could adversely impact PAXTV as a whole. If the network is not able to retain ownership of its distribution in the early years of its development, its chances of succeeding as an effective competitor to other networks will be slim indeed. In short, there would be no benefit to the public if Paxson was forced to divest a portion of its owned stations to comply with the national ownership rule.

A decision not to grandfather existing ownership interests also would violate existing constitutional and judicial restraints on the retroactive application of legislative rules. Section 551(4) of the Administrative Procedure Act defines a legislative rule as:

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy<sup>54/</sup>

Courts have emphasized that this provision requires administrative rules to be primarily concerned with the future rather than with past conduct.<sup>55/</sup> Retroactive rules are thus viewed with judicial suspicion and are subject to strict scrutiny because they interfere with the legally

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<sup>54/</sup> 5 U.S.C. § 551(4)(1994) (emphasis added).

<sup>55/</sup> See, e.g., *American Express Co. v. United States*, 472 F.2d 1050 (C.C.P.A. 1973); *Energy Consumers & Producers Ass'n, Inc. v. Department of Energy*, 632 F.2d 129 (Temp. Emer. Ct. App.), cert. denied, 449 U.S. 832 (1980).

induced, settled expectations of private parties.<sup>56/</sup> The Supreme Court recognizes that "[t]he protection of reasonable reliance interests is not only a legitimate governmental objective; it provides 'an exceedingly persuasive justification.'"<sup>57/</sup> This Commission, too, has recognized that retroactive application of rules and procedures is inequitable and disruptive to business.<sup>58/</sup>

A five-factor test has been used in determining whether a new rule being applied retroactively violates constitutional requirements:<sup>59/</sup> (1) whether the case is one of first impression; (2) whether the new rule is an abrupt departure from past practices or merely attempts to fill in a void in the law; (3) the extent of reliance on the former rule; (4) the burden retroactivity would impose; and (5) the statutory interest in applying the new rule despite reliance on the old one. Any decision by the FCC not to grandfather existing UHF ownership interests cannot pass this test.

This is not a case of first impression and it would be a significant departure from past practice: the Commission has consistently grandfathered nonconforming existing interests when it adopted new ownership restrictions. *See, e.g., Amendment of Part 76, Subpart J, of the Commission's Rules and Regulations, First Report and Order*, 53 FCC 2d 1102 (1975) (grandfathering broadcast-cable cross-ownership); *1975 Second R & O*, 50 FCC 2d at 1074

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<sup>56/</sup> Retroactive rules are not *per se* improper. *E.L. Wiegand Div. v. NLRB*, 650 F.2d 463, 471 (3d Cir. 1981), *cert. denied*, 455 U.S. 939 (1982).

<sup>57/</sup> *Heckler v. Mathews*, 465 U.S. 728, 746 (1984) (citation omitted).

<sup>58/</sup> *Cf. Amendments of Parts 20 and 24 of the Commission's Rules, Report and Order*, WT Docket No. 96-59, 3 Communications Reg. (P&F) 433, 471 (1996); *CATV of Rockford, Inc.*, 38 FCC 2d 10, 15 (1972), *recons. denied*, 40 FCC 2d 493 (1973).

<sup>59/</sup> *See, e.g., Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *Adelphia Cable Partners, L.P.*, 2 Communications Reg. (P&F) 76, 82 & n.42 (1995).

(grandfathering broadcast-newspaper cross-ownership); *Amendment of Part 73 of the Commission's Rules and Regulations With Respect to Competition and Responsibility in Network Television Broadcasting, Memorandum Opinion and Order*, Docket No. 12782, 25 FCC 2d 318, 318 (1970) (no divestiture required by new multiple ownership rules), *aff'd*, *Mansfield TV, Inc. v. FCC*, 442 F.2d 470 (2d Cir. 1971); *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Memorandum Opinion and Order*, Docket No. 14711, 3 RR 2d (P&F) 1554 (1964) (existing combinations grandfathered notwithstanding adoption of new contour overlap standards); *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, First Report and Order*, Docket No. 20548, 63 FCC 2d 824 (regional concentration of control rules include grandfathering provisions), *modified in part*, 67 FCC 2d 54 (1977); *Amendment of Section 73.636(a) of the Commission's Rules Relating to Multiple Ownership of Television Broadcast Stations, Notice of Proposed Rule Making and Memorandum Opinion and Order*, Docket No. 16068, 5 RR 2d (P&F) 1609 (1965) (Top 50 Market policy includes grandfathering provisions). A failure to grandfather existing ownership interests would be a radical and unjustified departure from this longstanding practice.

Further, entities that have acquired UHF stations relied on Commission rules permitting the acquisitions based on application of the UHF discount. The courts have long recognized that fairness and equity are dispositive in determining the acceptability of

retroactive regulation.<sup>60/</sup> Here, it would be grossly inequitable for the Commission to require divestiture of stations acquired in good faith and reliance on the regulatory regime.

Retroactive application of a new national ownership rule also would impose significant burdens on UHF stations. Many of the UHF stations acquired by Paxson over the last four years are weaker or newly-constructed UHF stations that would be economically devastated if divestiture is required. Under separate ownership, these stations would not have the same access to low cost, competitive diverse programming or significant financial resources, both of which are critical for newly operating and weaker stations. Forcing Paxson to sell these stations would adversely impact these stations' economic survival and, in turn, their service to the public.

Finally, there would be no statutory interest in applying the new rule. Congress has only required that the Commission review the UHF discount as part of an overall review of the ownership rules. There has been no mandate from Congress to repeal the UHF discount nor has Congress suggested that if ownership rule changes are adopted, they should be applied retroactively.

Failure to grandfather existing UHF ownership interests would retroactively apply new rules and requirements to the extreme disadvantage of parties' reasonable reliance interests. Not only would such action disserve the judicially-recognized legitimate government objective of protecting such interests: it would also disserve the public interest in enhanced television service.

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<sup>60/</sup> See, e.g., *Helvering v. Griffiths*, 318 U.S. 371, 402 (1943); *NLRB v. E & B Brewing Co.*, 276 F.2d 594, 600 (2d Cir. 1960), *cert denied*, 366 U.S. 908 (1961).

# ATTACHMENT

## D

Reply Comments of Paxson Communications Corporation, MM  
Docket No. 98-35, pp. 2-23, filed August 21, 1998.

among television program networks, and provide an incentive for the development of new networks.

In its own Comments in this proceeding, Paxson urged the FCC to increase the national television audience reach cap to 40%. Paxson demonstrated that this small increase in the national cap would have no adverse impact on the intensely diverse and competitive television industry. In these Reply Comments, Paxson also urges the Commission to create an exemption to the national audience reach cap for those companies with a non-controlling ownership interest in minority-owned and new entrant broadcasters. This exemption would encourage investment in minority-owned companies, without having any negative effect on diversity and competition.

Finally, Paxson supports elimination of the dual network rule. As demonstrated by numerous commenters, the prohibition on ownership of two broadcast networks no longer serves the public interest and should be repealed.

## *II. THE UHF DISCOUNT.*

There is no basis for the suggestion made by some commenters that the UHF discount should be eliminated because the UHF signal handicap no longer exists or that retaining the UHF discount will have an adverse impact on diversity and competition.<sup>2/</sup> As Paxson demonstrated in

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<sup>2/</sup> See Joint Comments of Press Communications, LLC and Greater Media, Inc., MM Docket No. 98-35, filed July 21, 1998, at 4 ("Press Comments"); Comments of National Broadcasting Company, Inc., MM Docket No. 98-35, filed July 21, 1998, at 16 ("NBC Comments"); Comments of Center for Media Education, Chinese for Affirmative Action, The Civil Rights Forum, Feminist Majority Foundation, League of United Latin American Citizens, Minority Media and Telecommunications Council, NOW Legal Defense and Education Fund, Philadelphia Lesbian and Gay Task Force, Rainbow/PUSH Coalition and Women's Institute for Freedom of the Press, MM Docket No. 98-35, filed July 21, 1998, at 17 ("CME Comments"); Comments of ABC, Inc., MM Docket No. 98-35, filed July 21, 1998, at 18-21 ("ABC Comments").

its Comments,<sup>3/</sup> UHF stations' limited signal reach is a technical and economic handicap that has not been overcome through advanced receivers or mandatory carriage on cable systems. Nor will the handicap be corrected through the conversion to digital television ("DTV"). Because the conversion to DTV is based on service replication, not service maximization, UHF stations simply will not have the same DTV service areas as their VHF competitors. None of the commenters has submitted any evidence that the UHF discount has had an adverse impact on program diversity or economic competition. Indeed, the evidence demonstrates otherwise. Not only has program diversity and competition increased since 1985 when the UHF discount was adopted, but the UHF discount has proven essential to the growth of new broadcast networks, offering viable alternatives to the original three networks, ABC, CBS and NBC.

*A. Advances in Technology and Cable Carriage Have Not Corrected the UHF Handicap.*

*1. Receiver Technology Does Not Improve Signal Strength.*

Contrary to the assertions of ABC, Inc. ("ABC") and the Center for Media Education, *et al.* ("CME"),<sup>4/</sup> improvements in television receivers have not leveled the playing field between UHF and VHF stations. As Paxson established in its Comments, a UHF signal is inherently weaker than a VHF signal. The propagation characteristics of a UHF channel make its signal transmissions far more susceptible to terrain obstructions than VHF signals, and receiver technology simply cannot compensate for this inherent signal problem.<sup>5/</sup> As described in the

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<sup>3/</sup> Comments of Paxson Communications Corporation, MM Docket No. 98-35, filed July 21, 1998, at 5-12 ("Paxson Comments").

<sup>4/</sup> ABC Comments at 19; CME Comments at 17-18.

<sup>5/</sup> See Joint Comments of Fox Television Stations, Inc. and USA Broadcasting, Inc., MM Docket No. 98-35, filed July 21, 1998, at 19-21 ("Fox/USA Comments"), and

Fox/USA Comments, even a UHF station operating with maximum facilities, nondirectional ERP of 5,000 kilowatts and HAAT of 610 meters, could achieve "only 69.1 percent of the maximum low band VHF Grade B area coverage, and only 79.2 percent of the maximum high band VHF Grade B area coverage."<sup>6/</sup> Of course, no UHF station is able to achieve maximum facilities so it is clear that the actual differences between UHF and VHF coverage are much greater.<sup>7/</sup>

The Commission has recognized that

[d]ue to the physical nature of the UHF and VHF bands, *delivery of television signals is inherently more difficult at UHF*. It should be recognized that *actual equality between these two services cannot be expected* because the laws of physics dictate that UHF signal strength will decrease more rapidly with distance than does VHF signal strength. . . [T]he fundamental limitation of UHF television involves its ability physically to reach viewers . . .<sup>8/</sup>

Paxson is unaware of any changes in the laws of physics over the last 13 years that would change the inherent disparity between the UHF and VHF bands. UHF stations simply do not have the physical ability to achieve the signal coverage of a VHF station.<sup>9/</sup> None of the commenters

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Engineering Statement of Jules Cohen, P.E., Attachment B thereto.

<sup>6/</sup> *Id.* Attachment B at 3.

<sup>7/</sup> *Id.*

<sup>8/</sup> *Amendment of Section 73.3555 [formerly Sections 73.35, 73.240 and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations, Memorandum Opinion and Order, 100 F.C.C.2d 74, 93 (1985) (emphasis added).*

<sup>9/</sup> *See Comments of the Association of Local Television Stations, Inc., MM Docket No. 98-35, filed July 21, 1998, at 8 ("ALTV Comments") ("[T]he limitations imposed on the UHF band are a matter of physics that do not change with the passage of time.").* *See generally* Fox/USA Comments, Exhibit B.

arguing against retention of the UHF discount has offered one iota of evidence to suggest otherwise.

2. *Cable Carriage Has Not Corrected the UHF Handicap.*

Mandatory cable carriage has not been the cure-all that ABC suggests.<sup>10/</sup> Although UHF stations have benefitted from mandatory cable carriage, cable carriage has not completely alleviated the disparity between UHF and VHF stations. Even with mandatory cable carriage rights, UHF stations are *still disadvantaged* because of their weaker signals. The fact remains that only 65% of television households in the United States subscribe to cable.<sup>11/</sup> Thus, UHF stations, because of their weaker signals are disadvantaged in reaching the remaining 35% of the nation's television households that receive broadcast signals over-the-air.

ABC's assumption that cable subscribers *ipso facto* receive via cable all of a market's UHF stations is grossly mistaken. Nothing could be further from the truth. A television station must provide a Grade B signal to a cable system headend in order to obtain mandatory cable carriage. Because of their limited service areas many UHF stations do not provide Grade B coverage to all cable headends in their market. Accordingly, many UHF stations are not carried on all of the cable systems in their markets because their signals cannot reach the system's headend. In addition, based on signal problems, cable systems routinely request authority from the FCC not to carry a UHF signal in certain communities and the FCC routinely grants such requests.

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<sup>10/</sup> ABC Comments at 19.

<sup>11/</sup> *Broadcasting & Cable Yearbook 1998* at xxxi.

As an example, since 1996, numerous cable systems serving communities in the New York and New Jersey portions of the New York, New York Designated Market Area ("DMA"), as defined by A.C. Nielsen, have petitioned the FCC for permission not to carry Paxson's television station WIPX(TV), licensed to Bridgeport, Connecticut and included in the New York Area of Dominant Influence ("ADI"). The FCC has, in almost all cases, granted those petitions based in large part on the station's limited coverage of the market. *See, e.g., Petition of U.S. Cablevision, Memorandum Opinion and Order*, 12 FCC Rcd 21144, 21154 (1997), where the Commission granted the cable operator's petition to delete from WIPX(TV)'s television market communities in Dutchess, Orange, Putnam and Ulster Counties lying outside of the station's Grade B contour;<sup>12/</sup> *Petition of TKR Cable Company, Memorandum Opinion and Order*, 12 FCC Rcd 3525, 3533 (1997), in which the Commission authorized TKR Cable not to carry WIPX(TV) on its systems serving communities in Orange County, New York, and Hamilton, Mercer, Monmouth, Middlesex, Ocean, Passaic, Somerset and Union Counties, New Jersey, based on distance to the cable communities and the fact that WIPX(TV)'s Grade B contour did not reach the communities at issue; and *Petition of TCI of Northern New Jersey, Inc., Memorandum Opinion and Order*, 12 FCC Rcd 891, 896 (1997), where the Commission granted the cable operator's petition to delete from WIPX(TV)'s television market 53 communities in northern New Jersey based in part on "dearth of viewership" and "lack of . . . Grade B coverage."<sup>13/</sup>

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<sup>12/</sup> Communities falling within WIPX(TV)'s Grade B contour were not deleted. *See id.* at 21153.

<sup>13/</sup> *See also Petition of TKR Cable Company, Memorandum Opinion and Order*, 11 FCC Rcd 17121, 17127, 17129 (1996) (citing lack of Grade B coverage and distance from cable communities as reasons to delete New York and New Jersey communities from WIPX(TV)'s television market); *Petition of Time Warner New York City Cable Group, Memorandum Opinion*